



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[EPA-HQ-OAR-2019-0435; FRL-10017-29-OAR]

RIN 2060-AU46

New Source Review Regulations; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; correction.

SUMMARY: The Environmental Protection Agency (EPA) is amending several New Source Review (NSR) regulations by making the following types of changes: correcting typographical and grammatical errors, removing court vacated rule language, removing or updating outdated or incorrect cross references, conforming certain provisions to changes contained in the 1990 Clean Air Act (CAA or Act) Amendments, and removing certain outdated grandfathering or transitional exemptions.

DATES: This final rule is effective on **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: The EPA has established a docket for this action, identified by Docket ID No. EPA-HQ-OAR-2019-0435. All documents in the docket are listed in the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in the docket or in hard copy at the EPA Docket Center Reading Room, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited

exceptions, to reduce the risk of transmitting COVID-19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. For further information on EPA Docket Center services and the current status, please visit us online at <https://www.epa.gov/dockets>. The hours of operation at the EPA Docket Center Reading Room are 8:30 a.m. - 4:30 p.m., Monday-Friday. The telephone number for the EPA Docket Center is (202) 566-1744.

FOR FURTHER INFORMATION CONTACT: For general questions about this document, please contact Mr. Ben Garwood, New Source Review Group, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504-03), Environmental Protection Agency, Research Triangle Park, North Carolina, 27711; telephone number (919) 541-1358; fax number (919) 541-4028; email address: garwood.ben@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document wherever “we,” “us,” or “our” is used, we mean the EPA.

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I. Background

The EPA published a notice of proposed rulemaking (NPRM) on December 20, 2019 (“2019 NPRM” or “2019 proposal”)¹ including revisions to four sets of NSR regulations.² The proposed revisions were intended to correct various typographical and grammatical errors, remove regulatory provisions that have been vacated by the court, remove or update outdated or incorrect cross references, conform certain provisions to changes contained in the 1990 CAA Amendments, and remove outdated exemptions.

The NSR regulations have undergone revisions and restructurings by the EPA during their long history as a result of statutory and policy changes, as well as numerous court decisions. These revisions and restructurings have sometimes introduced errors within those regulations. In this action, the EPA is finalizing revisions to address these inadvertent errors. The agency is also finalizing other revisions to reflect statutory changes enacted by Congress which have already been applied in practice or changes that have been necessitated by court decisions. Thus, the EPA considers this final rule to be administrative in nature. The EPA’s intent is to provide clarity to the affected NSR regulations, but not to alter the substantive requirements of those regulations. The NSR regulations affected by this action contain requirements for the preconstruction review of new major stationary sources and major modifications of existing major stationary sources.

In response to the 2019 proposal, the EPA received 15 sets of comments: five from industries and industry associations, five from anonymous commenters, four from state agencies, and one from an individual. The commenters generally agreed with most of the editorial and typographical changes that the EPA had proposed. Some commenters, however, disagreed with

¹ 84 FR 70092 (December 20, 2019).

² The four sets of NSR regulations include the Prevention of Significant Deterioration regulations at 40 CFR 51.166 and 52.21, and the Nonattainment NSR regulations at 40 CFR 51.165 and part 51 Appendix S (also known as the Emission Offset Interpretative Ruling).

some of the proposed changes and made alternative recommendations for consideration in the final rule. In addition, some commenters identified additional regulatory text needing changes. The following section addresses some of the significant comments and provides the EPA's responses. For a complete description of the comments received and the EPA's responses, please refer to the Response to Comment (RTC) document that the EPA has placed in the docket for this rulemaking.

In order to provide a clear description of the regulatory revisions contained in the 2019 proposal, the EPA also included a separate table in the rulemaking docket showing each of the proposed changes in a redline/strikeout (RLSO) format to clearly illustrate where and what changes were proposed. Some commenters correctly noted that there were some inconsistencies between the changes shown in the docketed table and the revised regulatory text in the 2019 NPRM. These inconsistencies have been corrected in this final rule and the table has been revised to show all of the changes that are being made to the four sets of NSR regulations, including those that have been made since the 2019 proposal. Further, the EPA has made some very minor, non-substantive rule language format conforming revisions in this final rule as required by Office of the Federal Register (OFR) guidelines for rule language publication in the Federal Register according to the Document Drafting Handbook³. These rule language consistency edits from OFR are contained in the final rule language and the revised table. The revised table is available in the docket for this final rule (see Reference Table of New Source Review Error Corrections—Final Rule, in Docket ID. No. EPA-HQ-OAR-2019-0435).

II. Response to Comments

Based on the comments received, the EPA is not finalizing some of the proposed changes or is finalizing revised versions of the proposed changes. The following section provides a summary of many of the comments received and the EPA's response to those comments, including our rationale for not finalizing some of the proposed changes or modifying changes

³ See <https://www.archives.gov/files/federal-register/write/handbook/ddh.pdf>

that were originally proposed. All of comments and responses, including those not discussed in this preamble, are included in the RTC, which the EPA has placed in the docket for this rulemaking.

Comments Received and the EPA's Responses.

A. Typographical, grammatical and punctuation errors. The EPA proposed to correct misspelled words, such as those contained in 40 CFR 51.165(a)(1)(viii) and 51.166(j)(4). No adverse comments were received concerning these types of corrections. The EPA did, however, receive comments providing notification of similar typographical errors, including the incorrect use of the word “and” in lieu of “through” in 40 CFR 51.166(b)(48)(ii) and 52.21(b)(49)(ii), and is making these corrections along with similar proposed corrections such as the use of “that” in lieu of “than” in 40 CFR 52.21(b)(1)(iii)(z). The EPA is also updating the rule language to correct other errors identified by commenters, including an inadvertent reference to “Class II” in the proposed revision to 40 CFR 52.21(u)(3), and other minor clarifying edits (*see* 40 CFR 51.165(a)(1)(xxi)(A) through (D), 51.165(a)(1)(xl), Appendix S II.A.12, Appendix S II.A.37, 51.166(b)(2)(iii)(a), 51.166(b)(12), 51.166(b)(32)(i) through (iv), 51.166(b)(48)(ii), 51.166(j)(1), 51.166(w)(9)(ii), 52.21(b)(12), 52.21(b)(33)(i) through (iv), 52.21(b)(49)(iii), and 52.21(j)(1)). These corrections are a logical outgrowth of the proposal but, in any event, the EPA also finds there is good cause to make these corrections without soliciting public comment on them because it would be unnecessary given that the changes are not substantive.⁴

In numerous instances, the EPA proposed to correct inappropriate words or punctuation, including capitalizations, commas and hyphens, such as those contained in 40 CFR 51.165(a)(2)(iii), Appendix S II.A.4.(iii), and 52.21(b)(23)(ii). One adverse comment was received on an edit proposed to the definition of “emissions increase” to change “is” to “shall be” to make the language consistent throughout the paragraph. The EPA had only proposed this

⁴ *See* 5 USC 553(b)(3)(B); 42 USC 7407(d)(1). For more information on the good cause exception to notice and comment rulemaking, *see* Section IV of this notice.

change in 40 CFR 52.21. The commenter pointed out that the use of “is” is already consistent within the paragraph and raised concern that the proposed change could be seen as suggesting that the provision would function as a significant emissions rate even though the EPA has not yet completed a rulemaking to set a significance level for GHGs. *See* 81 FR 68110 (October 3, 2016). Instead the commenter suggested deleting a comma to clarify the provision. The EPA agrees with the commenter and is not changing “is” to “shall be” in 40 CFR 52.21(b)(49)(iii) and 51.166(b)(48)(iii).

Other errors identified by commenters or identified by the EPA subsequent to the 2019 proposal include the inadvertent capitalization of “for” in 40 CFR 52.21(b)(48)(i)(c) and the incorrect pluralization of the term “standard” in 40 CFR 51.166(j)(1). Correction of these errors is a logical outgrowth of the proposal but, in any event, the EPA also finds there is good cause to make these corrections without soliciting public comment because it would be unnecessary given that the changes are not substantive.

B. Regulatory references. The EPA proposed to correct the way in which reference is made in one regulation to requirements contained in another regulation, such as references contained in 40 CFR 51.165(a)(1)(v)(C)(5)(i), 51.166(b)(2)(iii)(e)(I), 51.166(b)(2)(iii)(f), Appendix S II.A.5.(iii)(e)(I), and Appendix S II.A.5.(iii)(f). In some cases, the references were outdated, while others simply referenced an incorrect paragraph. The EPA did not receive adverse comment on these changes and the EPA is finalizing them in this rule. The EPA is also updating a reference made in 40 CFR 51.165(a)(3)(ii)(D) in response to a comment requesting that a reference made within this regulation to a memorandum be updated to reflect the subsequent codification of the referenced language. The EPA is similarly amending a dated reference in 40 CFR 51 Appendix S I. Introduction and correcting an erroneous cross reference in Paragraph IV.D from V to IV in response to comments received. These corrections are a logical outgrowth of the proposal but, in any event, the EPA also finds there is good cause to make these corrections without soliciting public comment given that the changes are not substantive.

C. Court vacatur. Some of the proposed changes involve the removal of text that the EPA needed to remove to implement the vacatur of the provision in a court ruling. These changes include the following:

1. In 2003, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) indefinitely stayed the effective date of the NSR provision known as the Equipment Replacement Provision (ERP), which amended the NSR requirements in 2003 to add a Routine Maintenance, Repair, and Replacement Exclusion.⁵ The ERP allowed sources to avoid NSR when replacing equipment under certain circumstances. The stay of the affected paragraphs was subsequently noted in the CFR under the three affected NSR regulations, 40 CFR 51.165, 51.166, 52.21.⁶ Later, in a 2006 decision, the court vacated the ERP, concluding that the provision was “contrary to the plain language of section 111(a)(4) of the Act.” *New York v. EPA*, 443 F.3d 880, 883 (D.C. Cir. 2006) (“*New York I*”). The EPA is now removing the vacated ERP provisions consistent with *New York II* as well as the notes contained in the affected NSR regulations describing the indefinite stay of the various affected provisions. *See* proposed 40 CFR 51.165(a)(1)(v)(C)(1), 51.165(h), 51.166(b)(2)(iii)(a), 51.166(y), 52.21(b)(2)(iii)(a), and 52.21(cc).

Additionally, in the proposal, the EPA noted that two components of the 2003 ERP rule, the criteria for “basic design parameters” (contained at 40 CFR 51.165(h)(2), 51.166(y)(2), and 52.21(cc)(2)), and “process units” (contained at 40 CFR 51.165(a)(1)(xlili), 51.166(b)(53), and 52.21(b)(55)), are incorporated within the definition of “replacement unit,” which was not part of the *New York II* decision. *See* 40 CFR 51.165(a)(1)(xxi), 51.166(b)(32), and 52.21(b)(33). The EPA proposed to move definitions and criteria for “basic design parameters” and “process unit,” into the definition of “replacement unit” in each of the three affected NSR regulations. *See*

⁵ 68 FR 61248 (October 27, 2003).

⁶ For example, in 40 CFR 52.21, the following note was added: “NOTE TO PARAGRAPH (b)(2)(III)(a): “By court order on December 24, 2003, the second sentence of this paragraph (b)(2)(iii)(a) is stayed indefinitely. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the **Federal Register** advising the public of the termination of the stay.”

proposed 40 CFR 51.165(a)(1)(xxi)(E)-(F), 51.166(b)(32)(v)-(vi), and 52.21(b)(33)(v)-(vi).⁷ The EPA's 2019 proposal to move this language to a different location in the regulation necessitated revising a cross reference made to the definition of "basic design parameters" to cite its new location. *See* proposed 40 CFR 51.165(a)(1)(xxi)(C), 51.166(b)(32)(iii), and 52.21(b)(33)(iii).⁸

Commenters had a variety of different recommendations in response to the EPA's 2019 proposal to relocate two definitions which the EPA did not consider to be subject to the court's vacatur decision. Those recommendations introduced alternative language for these provisions. Some commenters questioned the EPA's proposal to relocate certain components without also providing a more comprehensive rationale and opportunity for public comment. One commenter objected to moving the definition of "process unit" in an error corrections action, claiming that retaining provisions that were vacated by the court in a different location amounted to a substantive change because it "represents neither a statutory change nor a change required by a court decision." The same commenter claimed that the EPA provided no rationale for why the vacated definition of "process unit" should be retained, and further stated that "[i]f EPA believes a definition is necessary, it should provide an analysis of why the specific definition it has proposed is appropriate, instead of simply relying on a definition included in a rule that was vacated by a federal court." The commenter continued, however, that, should the EPA decide to define "process unit" as part of the definition of "replacement unit," then "[EPA] should clarify that this definition is limited to determining whether a unit meets the criteria for a replacement

⁷ There is language related to "process unit" that is only relevant to the ERP and was therefore not proposed to be retained within the definition of "replacement unit."

⁸ The EPA also notes that the ERP provisions and definition of "replacement unit" (promulgated under a separate rulemaking not affected by the court's ERP vacatur) were not added to the NSR regulations at 40 CFR part 51 Appendix S when the EPA amended the other NSR regulations in 2003. To fix this omission of the replacement unit provision, the EPA proposed to add the definition of "replacement unit," including the criteria for "basic design parameters" and "process unit," to Appendix S. *See* proposed paragraph II.A.37. In addition, a provision explaining that a replacement unit is considered to be an existing emissions unit was proposed to be added to the definition of "emissions unit." *See* proposed paragraph II.A.7.(ii). Together, these proposed changes were intended to make the Appendix S provisions concerning replacement units consistent with the other NSR regulations.

unit. This clarification would prevent confusion on the implication of this term.” Finally, the commenter recommended, as an alternative, that the EPA “could propose to eliminate the reference to process unit in the definition of ‘replacement unit’ and instead reference an ‘emissions unit.’”

Three commenters recommended that the EPA retain the definition of “functionally equivalent component” (*e.g.*, 40 CFR 52.21(b)(56)), which the EPA proposed to remove as part of the ERP vacatur component of this rule. One of the commenters recommended that the EPA incorporate the definition of “functionally equivalent component” into the definition of “replacement unit” “in order to retain the clarification that the ‘functionally equivalent component’ definition provides.” One of the commenters noted that “[t]he replacement unit provision was intended to recognize that identical replacement is not required and often is not possible, which is why EPA will look to the ‘function’ and the ‘basic design parameters.’” This commenter concluded that “[b]y deleting this definition, the intent of the replacement unit concept could be undermined.” Finally, one of the commenters also recommended that the EPA retain the definition of “functionally equivalent component,” as well as the definitions of “process unit” and “basic design parameters,” as separate definitions rather than as part of the definition of “replacement unit.”

A state commenter did not agree with the EPA’s 2019 proposal to relocate the three examples of “process units” for source categories, including refineries, municipal waste incinerators, and steam electric generating facilities. Another commenter recommended that if the EPA chose to retain an example of a process unit for a steam electric generating facility, the example should not include equipment that does not contribute to the production of electricity. The commenter claimed that “EPA provides no explanation for the inconsistency between its example for a pulverized coal-fired facility and the proposed regulatory text for a steam electric generating facility, which states that only portions of the plant that contribute directly to the production of electricity would be included in the definition of ‘process unit.’”

Another state agency commenter noted that in the 2019 proposal the EPA “inadvertently” left out the paragraph describing “pollution control equipment,” which the commenter stated was supposed to have been included in the definition of “process unit” and therefore should have been included with the EPA’s proposal to relocate the definition of “process unit.” The affected provision, previously contained at 40 CFR 51.165(a)(1)(xlili)(B), 51.166(b)(53)(ii), and 52.21(b)(55)(ii), reads as follows: “Pollution control equipment is not part of the process unit, unless it serves a dual function as both process and control equipment. Administrative and warehousing facilities are not part of the process unit.”

The EPA has carefully considered the adverse comments concerning the proposal to relocate certain provisions that were part of the 2003 ERP rule vacated by the court in 2006. Due to the concerns expressed in the comments, the EPA has decided to also remove provisions pertaining to “process unit” and “basic design parameters” in this final rule. Based upon comments received, we have been persuaded that the better interpretation of the judgment in *New York II* is that the court vacated the ERP rule in its entirety, such that the EPA should remove all of this content to effectuate the judgment. While the replacement unit definition was adopted in a separate 2003 rulemaking that was not vacated by the court, that rulemaking action (which pre-dated *New York II*) does not provide a sufficient basis to conclude that content from the ERP rule that is referenced in definition of the “replacement unit” survived the vacatur. Since this dynamic is not addressed in *New York II* and that opinion post-dates the 2003 rule, the EPA believes *New York II* is best read as vacating all the content adopted in the ERP rule. Therefore, at this time, the EPA is removing the entirety of the ERP rule from the NSR regulations and is not moving the definitions of “basic design parameters” and “process unit” into the “replacement unit” definition in this final rule. For the same reason, the EPA is removing the definition of “functionally equivalent component” as proposed.

As a result of this action, the NSR regulations will lack a definition of “basic design parameters” and “process unit” that can be applied in the context of identifying whether a unit is

a “replacement unit.” However, while not controlling, the EPA and stakeholders may continue to look to the vacated definitions from the ERP rule to guide their understanding of the definition of “replacement unit.” The EPA will evaluate whether further rulemaking is needed to restore definitions of “basic design parameter” and “process unit.” If this need does arise, such a rulemaking would provide an opportunity for more targeted public input on the way such terms should be defined when applied in the specific context of defining a “replacement unit” for purposes of determining the method of calculating the change in emissions from a project.

2. In 2007, the EPA removed certain provisions pertaining to Clean Units (CU) and Pollution Control Projects (PCP), which were vacated by the D.C. Circuit in *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005) (“*New York I*”).⁹ The EPA explained that, although the court’s opinion addressed the CU and PCP provisions in 40 CFR 52.21, but not the corresponding provisions in 40 CFR 51.165 and 51.166, “the plain language of the Court’s opinion clearly applies to the parallel constructions in those latter provisions” 72 FR 32526, 32527 (June 13, 2007). Accordingly, the EPA’s 2007 action was intended to remove the relevant provisions from all three NSR regulations, but the EPA only specified its removal from 40 CFR 51.165 and not 40 CFR 51.166 and 52.21. Therefore, in the 2019 NPRM, the EPA proposed to remove the remaining CU and PCP provisions that were vacated in accordance with *New York I*. See proposed 40 CFR 51.166(b)(3)(iii)(c), 52.21(b)(3)(iii)(b), and cross references to vacated PCP provisions 40 CFR 51.165(a)(2)(ii)(A), 51.166(a)(7)(iv)(a), and 52.21(a)(2)(iv)(a). The EPA did not receive any adverse comments addressing this aspect of the 2007 proposal and is therefore finalizing the changes to the regulatory text addressing the vacatur as proposed.

D. Outdated and incorrect references.

1. In 1980, the EPA made significant revisions to the PSD regulations under parts 51 and 52.¹⁰ One revision deleted existing paragraph (k) and redesignated paragraphs (l) through (s) as

⁹ 72 FR 32526 (June 13, 2007).

¹⁰ 45 FR 52676 (August 7, 1980).

(k) through (r). The EPA proposed to correct incorrect references affected by the 1980 redesignation of paragraphs (l) through (s). The EPA received no adverse comment on this proposed revision and will be finalizing this change. *See* 40 CFR 51.166(r)(2) and 52.21(r)(4).

2. In the same 1980 rulemaking, the EPA added a provision under the source obligation requirements at 40 CFR 52.21(r)(2) applicable to stationary sources that might be granted a future relaxation of a preconstruction permit that previously enabled the source or modification to be regulated as a “minor” rather than as a major stationary source. The provision requires the owner or operator of a source or modification obtaining a relaxation of the limits referenced to comply with the permit requirements for a major stationary source or major modification as if construction had not yet commenced on the source or modification. The provision references the permit requirements contained under paragraphs (j) through (s) of 40 CFR 51.166. However, paragraph (s) contains discretionary provisions concerning the application of innovative control technology. In light of the non-mandatory nature of those provisions, it should not have been included in the reference to required permit elements. Accordingly, the EPA proposed to correct the source obligation requirement at 40 CFR 51.166(r)(2) by removing the reference to paragraph (s) and replacing it with a reference to paragraph (r). *See* proposed 40 CFR 51.166(r)(2). The EPA received a comment supporting this proposed change, but no adverse comments, and will therefore finalize this change as proposed.

3. The Nonattainment New Source Review (NNSR) regulations at 40 CFR 51.165 and 40 CFR part 51 Appendix S contain a restriction which prohibits sources that replace one hydrocarbon compound with another of lesser reactivity from obtaining emissions credit for that replacement. *See* 40 CFR 51.165(a)(3)(ii)(D) and part 51 Appendix S IV.C.4. At the same time, the provisions make it clear that a source may obtain an emissions credit, also referred to as an offset credit (when intended to be used as an emissions offset), in cases where a VOC is replaced by an organic compound that is not considered to be a VOC (*i.e.*, recognized to have negligible photochemical reactivity). The EPA has now included as part of the regulatory definition of

“volatile organic compounds,” codified at 40 CFR 51.100(s), organic compounds that are not VOCs that the EPA included in the definition because they have negligible photochemical reactivity. Accordingly, we proposed to revise both sets of NNSR regulations to provide an updated reference to the organic compounds that the EPA does not define as VOC.

Two commenters recommended that the EPA completely delete, rather than edit, these provisions, asserting that they are outdated offset conditions. One of the commenters, using CAA section 173(c) as their basis, noted that “[w]hen the EPA changed from regulating hydrocarbons to regulating VOC as a single pollutant, the EPA no longer considered reactivity in the offsets provision.”

The EPA recognizes that because of the shift in how the EPA regulates photochemically reactive compounds that form ozone, this restriction on offsets may no longer be necessary. However, the EPA did not provide a rationale for the wholesale removal of this restriction. Therefore, the EPA is making the proposed change, with some small variations. The provisions will be revised to update the list of negligible photochemical reactive compounds and to more clearly reflect the fact that the organic compounds listed with negligible photochemical reactivity are, by definition, not VOCs. At worst, the continued inclusion of this restriction on offsets is merely redundant. The EPA may consider whether to remove it in a future action. *See* 40 CFR 51.100(s)(1) and paragraph IV.C.4. at part 51 Appendix S.

4. In 1986, the NSR provisions in 40 CFR 51.18 were moved in a restructuring rule that placed them under new subpart I of part 51.¹¹ 40 CFR 51.18 is an obsolete reference to the NSR regulations that were applicable to minor sources, major sources locating in areas that do not meet the National Ambient Air Quality Standards (NAAQS) (40 CFR 51.18(j)), and major sources locating in areas that meet the NAAQS, but significantly impact an area that is not meeting the NAAQS (40 CFR 51.18(k)). Subpart I now contains the preconstruction review requirements for state minor NSR programs (40 CFR 51.160-164) as well as state major NNSR

¹¹ 51 FR 40656 (November 7, 1986).

programs (40 CFR 51.165) and state PSD programs (40 CFR 51.166).¹² The EPA proposed to update the reference to 40 CFR 51.18 in Appendix S V.A. by replacing it with a reference to 40 CFR 51.165, which includes NSR requirements for major stationary sources in nonattainment areas. *See* proposed section V.A. [2nd paragraph] of 40 CFR part 51, Appendix S. The EPA received two comments supporting this change as proposed and received no adverse comments regarding this proposed change. Upon review for the final rule, the EPA determined that the citation referencing 40 CFR 51.165 should be changed to 40 CFR 51.102 since the reference in Appendix S Paragraph V.A. concerns the proper public participation process for a state implementation revision if necessary to make an offset enforceable. 40 CFR 51.102 addresses the public notice for the preparation, adoption and submittal of implementation plans and is therefore a more appropriate reference than the proposed reference to 40 CFR 51.165.

5. On December 31, 2002, the EPA amended its NSR regulations to add, among other things, provisions for Plantwide Applicability Limitations (PALs).¹³ In each of the NSR regulations, new provisions were added to require major stationary sources with PAL permits to monitor affected emissions units in accordance with monitoring requirements set forth elsewhere in the regulations. The PSD regulations at 40 CFR 51.166 incorrectly provided a reference to the recordkeeping requirements under paragraph (w)(13) instead of the intended monitoring requirements for PALs at paragraph (w)(12). The other NSR regulations provided the correct cross reference to the monitoring requirements. The EPA proposed to correctly reference the monitoring requirements for PALs in 40 CFR 51.166(w)(7)(vii). The EPA received no adverse comments on this proposed change and will therefore finalize the change as proposed.

6. On December 21, 2007, the EPA amended the NSR regulations by, among other things, adding new paragraphs to explain when a stationary source will have a “reasonable

¹² Subpart I of part 51 also contains the PSD regulations at 40 CFR 51.166, which were previously codified at 40 CFR 51.24.

¹³ 67 FR 80186 (December 31, 2002).

possibility” of causing a significant emissions increase.¹⁴ In 40 CFR 51.166(r)(6)(vi)(b), reference is incorrectly made to “paragraph (a)(6)(vi)(a)” and “paragraphs (a)(6)(ii) through (v).” Both references mistakenly reference paragraph (a), which is where similar references are made in the “reasonable possibility” provision contained in 40 CFR 51.165(a)(6)(vi)(B). The EPA proposed to correct the references in 40 CFR 51.166 by changing the language to reference the applicable subparagraphs under paragraph (r). The EPA did not receive any adverse comments on the proposed changes and will therefore finalize the changes as proposed.

E. Clean Air Act Amendments. Some of the corrections result from new statutory requirements introduced in the 1990 CAA Amendments, which the EPA did not address in subsequent rulemakings involving the affected NSR regulations.

1. Major source threshold for municipal incinerators. The 1990 CAA Amendments amended the definition of “major emitting facility” at section 169(1) by striking out the words “two hundred and” as those words appeared in the phrase “municipal incinerators capable of charging more than two hundred and fifty tons of refuse per day.”¹⁵ This amendment had the effect of lowering the charging capacity threshold for qualifying a municipal incinerator as a “major emitting facility” from 250 tons of refuse per day to 50 tons per day when such incinerator emits or has the potential to emit at least 100 tons per year of any regulated NSR pollutant. In the 2019 NPRM, the EPA proposed to revise all four sets of major NSR regulations to reflect this change with regards to the statutory definition of “major emitting facility” for municipal incinerators. *See* proposed 40 CFR part 51 Appendix S II.A.4.(iii)(h), Appendix S II.F.8, 40 CFR 51.165(a)(1)(iv)(C)(8), 51.165(a)(4)(viii), 51.166(b)(1)(i)(a), 51.166(b)(1)(iii)(h), 51.166(i)(1)(ii)(h), 52.21(b)(1)(i)(a), 52.21(b)(1)(iii)(h), and 52.21(i)(1)(vii)(h). The EPA did not receive any adverse comments on the proposed changes and will finalize the changes as proposed.

¹⁴ 72 FR 72607 (December 21, 2007).

¹⁵ Par. (1). Pub. L. 101–549, section 305(b) (1990).

2. Standards under section 112 of the Act. The NSR regulations in several places refer to emissions standards established pursuant to 40 CFR part 61. *See e.g.*, 40 CFR 51.166(b)(12). Part 61 contains national emission standards for hazardous air pollutants (NESHAP), which the EPA promulgated based on the pre-1990 CAA Amendment version of section 112. The 1990 CAA Amendments revised section 112, causing the EPA to promulgate additional NESHAP, which are included in part 63. Accordingly, to ensure that the requirements associated with the section 112 standards are adequately addressed in the NSR regulations, the EPA proposed that each regulatory reference to part 61 should also include a reference to part 63. The EPA proposed to make the necessary updates in the affected NSR regulations.

Several commenters recommended various options that differed from the 2019 EPA proposal. A state agency commenter recommended that the EPA add reference to not only part 63 but also to part 62. This, the commenter noted, would “include all potentially applicable federal standards” to specific provisions under the affected NSR regulations. 40 CFR part 62 sets forth the Administrator's approval and disapproval of state plans for the control of pollutants from facilities regulated under CAA 111(d) and 129 and the Administrator's promulgation of such plans or portions of plans when a state has failed to provide an approvable plan or portions thereof. Plans under part 62 contain standards of performance that apply to existing sources that would be subject to 40 CFR part 60 (standards of performance for new stationary sources) if such existing sources were new sources. Such plans are approved state plans or federal plans for each separate source category.

Two commenters claimed that the EPA has incorrectly proposed to add reference to part 63 because the CAA at section 112(b)(6), added to the Act in 1990, explicitly removes section 112 hazardous air pollutants (HAPs) from the PSD program. One of the commenters noted that the NNSR program “inherently does not directly regulate a HAP as it is not a criteria pollutant with a national ambient air quality standard.” Thus, the commenters argued that the EPA was incorrect in proposing to add reference to part 63 and should additionally be removing reference

to part 61, which also contains standards for HAPs. One of the commenters concluded that “including part 61 and, as proposed, part 63 in various NSR definitions will give the mistaken impression that HAPs are regulated by the NSR programs.” The commenters acknowledged that the statutory definition of “best available control technology” did include a reference to standards promulgated pursuant to CAA section 112; therefore, one of the commenters recommended that “[i]n order to reduce confusion from the insertion of parts 61 and 63 to the PSD BACT requirements and to remain consistent with the 1991 transitional guidance, EPA should clarify in the rule that BACT applies to a regulated NSR pollutant by adding the term ‘for a regulated NSR pollutant’ after the term ‘major stationary source or major modification’ in 40 CFR 51.166(j)(1) and 52.21(j)(1).”

One commenter was concerned about the EPA’s 2019 proposal to add reference to part 63 to the definition of “allowable emissions.” The commenter indicated that the addition of a reference to part 63 therein would indicate that Congress intended that compliance with limits issued under CAA section 112, as amended in 1990, should not be considered creditable reductions for netting purposes. The commenter further stated that “there is no indication that Congress intended Maximum Achievable Control Technology (‘MACT’) (or CAA section 112(f)) reductions to be excluded under a creditability rationale.” Moreover, the commenter argued that “[i]f EPA intends this result... then the agency must do it in a more substantive rulemaking, not as part of this ‘error correction’ rulemaking.”

In light of several commenters’ adverse comments expressing concerns about adding a reference to part 63 emissions standards to the NSR regulations, the EPA has decided not to finalize the proposed changes concerning the part 63 reference, with one exception. The EPA agrees that additional assessment is needed to determine how including HAPs in the definitions of “allowable emissions” and “federally enforceable” would function in practice and whether the commenters’ concerns are justified. However, in one particular case—the definition of “BACT”—the statute expressly requires the inclusion of emissions standards under CAA section

112 in that definition (which includes emissions limitations contained in both 40 CFR parts 61 and 63). By adding the restriction that BACT cannot allow emissions in excess of 112 standards, the EPA is not suggesting that HAPs are regulated under NSR. Rather, there are certain NSR regulated pollutants that inherently include HAP pollutants. For instance, PM may contain constituents that include HAPs, such as cadmium. By including the CAA section 112 standards in the restriction in the definition of BACT, the EPA is ensuring that BACT cannot allow emissions of HAPs in excess of any applicable section 112 standard under 40 CFR parts 61 and 63. *See* revised 40 CFR 51.165(a)(1)(xl), 51.166(b)(12), part 51 Appendix S II.A.34, and 52.21(b)(12).

F. Outdated exemptions.

The PSD regulations at 40 CFR 51.166 and 52.21 contain various exemption provisions that allow certain permit applicants—*e.g.*, portable stationary sources and nonprofit health or nonprofit educational institutions—to be exempt from all or a portion of the PSD preconstruction review requirements. In some cases, these provisions allowed permit applicants to be excluded from certain requirements—*e.g.*, new or revised PM_{2.5} NAAQS or PSD increments—which became effective before a final permit could be issued, commonly known as PM_{2.5} grandfathering provisions (*see* 40 CFR 51.166(i)(10) and 52.21(i)(11)). Some of the existing exemption provisions are outdated because the time in which they were relevant has long since passed. Accordingly, the EPA proposed to remove such outdated provisions, which allow for grandfathering or the implementation of alternative procedures for PSD permit applicants, under the regulations at 40 CFR 51.166 and 52.21.

The EPA received a few adverse comments concerning the proposed removal of outdated exemptions. One of these comments pertained to an exemption that the EPA did not actually propose to remove. The commenter correctly pointed out that the PSD exemption applicable to portable sources, 40 CFR 52.21(i)(1)(viii), continues to be relevant and should not be removed. The EPA acknowledges that the preamble text indicated that the EPA proposed to delete

paragraphs (i)(1)(viii) through (x) of the 40 CFR 52.21 PSD regulations, which include the portable source provision at paragraph (i)(1)(viii). However, it was not the EPA's intention to delete paragraph (i)(1)(viii) and a review of the proposed regulatory text and the Error Corrections Table in the docket shows that the EPA did not actually include the deletion of this paragraph in the 2019 proposal. Instead, the proposed regulatory text shows the deletion of only paragraphs (i)(1)(ix) and (x). Accordingly, the EPA is not deleting the portable source exemption provision at 40 CFR 52.21(i)(1)(viii) in this final action. As proposed, the EPA is deleting the following outdated exemption provisions in the final rule: 40 CFR 51.166(i)(6) through (11); 52.21(i)(1)(i) through (v), 52.21(i)(6) through (12), and 52.21(m)(1)(v), and 52.21(m)(1)(vii) and (viii) and 52.21(i)(1)(ix) and (x).

The EPA received one comment asking that the EPA retain the outdated exclusion of carbon dioxide emissions from biogenic material (the combustion or decomposition of non-fossilized and biodegradable organic material originating from plants, animals, or micro-organisms) from the definition of "subject to regulation." This temporary exclusion was vacated by a court in 2013¹⁶ and expired on its own terms on July 21, 2014. The commenter suggested that, because this expiration was relatively recent, "[r]etaining this language will aid regulatory personnel, owners/operators, and consultants in the future when trying to fully understand the basis for recent NSR permitting determinations based on EPA's prior GHG requirements." The EPA is not persuaded that this justifies retaining the vacated and outdated provision. If anyone seeks to understand the basis of older NSR permitting decisions, they can consult the version of the Code of Federal Regulations that applied at the time of those decisions. Therefore, the EPA is finalizing removal of the vacated and outdated exclusion of carbon dioxide emissions from biogenic material from the definition of "subject to regulation." *See* 40 CFR 51.166(b)(48)(ii)(a) and 52.21(b)(49)(ii)(a).

III. Final Action

¹⁶ *Center for Biological Diversity v. EPA*, 722 F.3d 401 (D.C. Cir. 2013).

This final action corrects minor, inadvertent, and non-substantive errors in 40 CFR parts 51 and 52 which govern NSR permitting programs, and updates the regulatory text to reflect statutory changes and certain court decisions vacating elements of the regulatory text, but does not change the requirements within these programs. Based upon comments received, as noted in this preamble and the RTC document in the docket, the EPA is moving forward with the majority of the proposed minor edits without change. Additionally, regarding state SIP submittals, the 2019 NPRM proposed that states need not be subject to any deadline to make conforming changes. The EPA received one comment in support of this position and no adverse comments. The EPA is therefore reaffirming that states can have discretion as to when to make these changes and may choose to combine them with other SIP submittals. Also, please refer to the RTC for further discussion about comments which are not included in Section II of this final rule preamble.

IV. Removal of Vacated Ozone NAAQS Grandfathering and Ozone Interprecursor Trading Provisions

This final action removes an exemption in the PSD regulations vacated by the D.C. Circuit in 2019 as well as the ozone interprecursor trading (IPT) provision in the NNSR regulations vacated by the D.C. Circuit in 2021. This section explains the court's vacatur of these provisions and the basis for their removal.

On October 26, 2015, the EPA promulgated a final rule containing revised NAAQS for ozone and grandfathering provisions that enabled pending PSD permit applications to be issued on the basis of a demonstration that the proposed source would not cause or contribute to a violation of the prior ozone NAAQS in effect at the time the permit application was deemed to be complete or noticed for public comment.¹⁷ The PSD grandfathering provisions were promulgated as a transition plan to reduce delays to pending PSD permit applications that may have otherwise been caused by the revised ozone standards. The PSD regulations implement

¹⁷ 80 FR 65292 (October 26, 2015).

CAA section 165(a)(3)(B) at 40 CFR 52.21(k)(1) and 51.166(k)(1) and require that PSD permit applications include a demonstration that emissions from the proposed facility will not cause or contribute to a violation of any NAAQS, which generally means any NAAQS in effect on the date of a PSD permit issuance. Absent the PSD grandfathering provision, this demonstration requirement would have applied to the 2015 ozone NAAQS in any PSD permit application pending at the time the 2015 ozone NAAQS became effective. However, on August 23, 2019, the U.S. Court of Appeals for the District of Columbia Circuit concluded that the EPA lacked the authority to grandfather pending PSD permit applications in this manner and vacated the ozone NAAQS grandfathering provisions in a decision resolving challenges brought by industry, state, and environmental and public health petitioners to the 2015 primary and secondary ozone NAAQS and the PSD grandfathering provisions that were promulgated with these standards.¹⁸

On December 6, 2018, the EPA promulgated the final implementation rules for the 2015 ozone NAAQS, including provisions to address for ozone ground level ozone precursors Oxides of Nitrogen (NO_x) and VOC. The provisions at 51.165(a)(11)(i) and Part 51 Appendix S Paragraph IV.G.5. were promulgated to allow permit applications to use IPT to satisfy the NNSR offset requirement for ozone in nonattainment areas. The IPT provisions were designed to support the EPA's long-standing policy allowing NNSR permit applicants to satisfy their offset obligation for ozone precursors substituting NO_x for VOC, or vice versa, supported by a technical demonstration showing an equivalent, or greater, air quality benefit with respect to ground level ozone concentrations in the ozone nonattainment area.¹⁹ On January 29, 2021, the D.C. Circuit concluded that Ozone IPT is not permissible under the CAA and vacated this part of the 2018 regulation.²⁰ Thus, in this action, EPA is removing the language allowing interprecursor trading for ozone and restoring the language in the NNSR regulations to the form it was in after the EPA's 2008 PM_{2.5} implementation rule.

¹⁸ *Murray Energy Corp. v. EPA*, 936 F.3d 597 (D.C. Cir. 2019).

¹⁹ 83 FR 62998 (December 6, 2018).

²⁰ *Sierra Club v. EPA*, No. 15-1465 (D.C. Cir. 2021).

The EPA did not include the removal of these court-vacated provisions at 40 CFR 51.166(i)(11), 52.21(i)(12), 51.165(a)(11) and Part 51 Appendix S Paragraph IV.G.5. in the proposal to this rule. However, the EPA is adding this action to this final rule without providing an opportunity for public comment or a public hearing because the EPA finds that the Administrative Procedure Act (APA) good cause exemption applies here. In general, the APA and section 307(d) of the CAA require that general notice of proposed rulemakings shall be published in the **Federal Register**. Such notice must provide an opportunity for public participation in the rulemaking process. However, the APA and section 307(d) of the CAA provide an avenue for an agency to directly issue a final rulemaking in certain specific instances. This may occur, in particular, when an agency for good cause finds (and incorporates the finding and a brief statement of reasons in the rule issued) that notice and public procedure thereon are impracticable, unnecessary or contrary to the public interest. *See* 5 USC 553(b)(3)(B); 42 USC 7407(d)(1). The EPA has determined that it is not necessary to provide a public hearing or an opportunity for public comment on this action because amending the regulations to remove the vacated grandfathering and ozone IPT provisions is a necessary ministerial act. Since the court vacated these provisions, the EPA no longer has the authority to allow the use of the affected provisions. Therefore, in as much as this action to remove the affected regulatory text simply implements the decision of the court, providing an opportunity for public comment or a public hearing on this issue would serve no useful purpose.

In addition, providing notice and comment would be contrary to the public interest because it would unnecessarily delay the removal of the unlawful grandfathering and ozone IPT provisions from the Code of Federal Regulations, which could result in confusion for the regulated industry and state, local, and tribal air agencies about the PSD and NNSR regulations and permitting. Promulgation of this rule serves to clarify that sources cannot continue to demonstrate their compliance with the PSD and NNSR requirements by relying on the prior ozone NAAQS, or ozone IPT, respectively, as was previously allowed. It is thus in the public

interest for the EPA to remove the PSD Grandfathering and Ozone IPT provisions without delay. Consistent with the approach described in section III, the EPA is not establishing a deadline in this rule for states to remove these provisions from the SIPs. States thus have the discretion as to when they amend their SIPs to remove the Ozone PSD grandfathering and Ozone IPT provisions and may combine such changes with other SIP submittals.

For these reasons, the EPA finds good cause to issue a final rulemaking to remove the ozone NAAQS grandfathering and ozone NNSR IPT provisions pursuant to section 553 of the APA, 5 USC 553(b)(B). Therefore, the requirements of CAA section 307(d), including the requirement for public comment and hearing on proposed rulemakings, do not apply to this action.

V. Environmental Justice Considerations

This action corrects minor, inadvertent, and non-substantive errors in 40 CFR parts 51 and 52 governing NSR permitting programs and updates the regulatory text to reflect statutory changes and certain court decisions vacating elements of the regulatory text but does not change the requirements within these programs. Therefore, this final rule will not change the protection for all those residing, working, attending school, or otherwise present in the applicable areas, regardless of minority and economic status. Further, this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income, or indigenous populations.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563:

Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was, therefore, not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA. This action is clerical in nature and addresses non-controversial edits to errors in the NSR regulatory text. Therefore, this final rulemaking does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control number 2060-0003.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. This action corrects minor, inadvertent and non-substantive errors in existing rules. We have therefore concluded that this action will have no net regulatory burden for all directly regulated small entities.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

This action corrects minor, inadvertent and non-substantive errors in existing rules.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. This action only makes technical amendments to correct minor, inadvertent, and non-substantive errors in existing rules. None of these technical amendments has a substantial direct effect on any tribal land; thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

This action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994).

The documentation for this decision is contained in Section IV of this preamble titled “Environmental Justice Considerations.” This action makes technical amendments to correct minor, inadvertent, and non-substantive errors to existing rules.

K. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

L. Judicial Review

Under CAA section 307(b)(1), petitions for judicial review of any nationally applicable regulation, or any action the Administrator “finds and publishes” as based on a determination of nationwide scope or effect must be filed in the United States Court of Appeals for the District of Columbia Circuit within 60 days of the date the promulgation, approval, or action appears in the **Federal Register**.²¹ These technical amendments are nationally applicable, as it corrects minor, inadvertent, and non-substantive errors to existing rules. As a result, petitions for review of this final action must be filed in the United States Court of Appeals for the District of Columbia Circuit by **[INSERT DATE 60 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Filing a petition for reconsideration by the Administrator of this final action does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review must be filed and shall not postpone the effectiveness of this action.²²

VII. Statutory Authority

The statutory authority for this action is provided by 42 U.S.C. 7401, *et seq.*

List of Subjects

40 CFR Part 51

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, National Ambient Air Quality Standards, New Source Review, Nitrogen dioxide, Ozone, Particulate matter, Preconstruction permitting, Sulfur oxides, Transportation, Volatile organic compounds.

²¹ 42 USC 7607(b)(1).

²² 42 USC 7607(d)(7)(B).

Environmental protection, Administrative practice and procedure, Air pollution control, BACT, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, National Ambient Air Quality Standards, New Source Review, Nitrogen dioxide, Ozone, Particulate matter, Preconstruction permitting, Sulfur oxides, Volatile organic compounds.

Sincerely yours,

Michael S. Regan,
Administrator.

For the reasons set forth in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION AND SUBMITTAL OF IMPLEMENTATION PLANS

1. The authority citation for part 51 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

Subpart I—Review of New Sources and Modifications

2. Amend § 51.165 by:

- a. Revising paragraph (a)(1)(iv)(C)(8);
- b. Revising paragraph (a)(1)(v)(C)(1);
- c. Revising paragraph (a)(1)(v)(C)(5)(i);
- d. Revising paragraph (a)(1)(v)(C)(6);
- e. Revising paragraph (a)(1)(viii);
- f. Revising paragraph (a)(1)(xxi)(A) through (D);
- g. Revising paragraph (a)(1)(xl);
- h. Removing paragraphs (a)(1)(xliii) through (xlvi);
- i. Revising paragraph (a)(2)(ii)(A);
- j. Adding paragraph (a)(2)(iii);
- k. Revising paragraph (a)(3)(ii)(D);
- l. Revising paragraph (a)(4)(viii);
- m. Revising paragraph (a)(11); and
- n. Removing and reserving paragraph (h);

The revisions read as follows:

§ 51.165 Permit requirements.

(a) * * *

(1) * * *

(iv) * * *

(C) * * *

(8) Municipal incinerators capable of charging more than 50 tons of refuse per day;

* * * * *

(v) * * *

(C) * * *

(I) Routine maintenance, repair and replacement;

* * * * *

(5) * * *

(i) The source was capable of accommodating before December 21, 1976, unless such change would be prohibited under any federally enforceable permit condition which was established after December 12, 1976, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR part 51, subpart I.

* * * * *

(6) An increase in the hours of operation or in the production rate, unless such change is prohibited under any federally enforceable permit condition which was established after December 21, 1976, pursuant to 40 CFR 52.21 or regulations approved pursuant to 40 CFR part 51, subpart I.

* * * * *

(viii) *Secondary emissions* means emissions which would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself. For the purpose of this section, secondary emissions must be specific, well defined, quantifiable, and impact the same general area as the stationary source or modification which causes the secondary emissions. Secondary emissions include emissions from any offsite support facility which would not be constructed or increase its emissions except as a result of the construction or operation of the major stationary

source or major modification. Secondary emissions do not include any emissions which come directly from a mobile source, such as emissions from the tailpipe of a motor vehicle, from a train, or from a vessel.

* * * * *

(xxi) * * *

(A) The emissions unit is a reconstructed unit within the meaning of § 60.15(b)(1) of this chapter, or the emissions unit completely takes the place of an existing emissions unit;

(B) The emissions unit is identical to or functionally equivalent to the replaced emissions unit;

(C) The replacement does not alter the basic design parameters of the process unit; and

(D) The replaced emissions unit is permanently removed from the major stationary source, otherwise permanently disabled, or permanently barred from operation by a permit that is enforceable as a practical matter. If the replaced emissions unit is brought back into operation, it shall constitute a new emissions unit.

* * * * *

(xl) *Best available control technology (BACT)* means an emissions limitation (including a visible emissions standard) based on the maximum degree of reduction for each regulated NSR pollutant which would be emitted from any proposed major stationary source or major modification which the reviewing authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant. In no event shall application of best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR part 60, 61, or 63. If the reviewing authority determines that technological or economic limitations on the application of measurement methodology to a

particular emissions unit would make the imposition of an emissions standard infeasible, a design, equipment, work practice, operational standard, or combination thereof, may be prescribed instead to satisfy the requirement for the application of BACT. Such standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of such design, equipment, work practice or operation, and shall provide for compliance by means which achieve equivalent results.

* * * * *

(2) * * *

(ii) * * *

(A) Except as otherwise provided in paragraph (a)(2)(iii) of this section, and consistent with the definition of major modification contained in paragraph (a)(1)(v)(A) of this section, a project is a major modification for a regulated NSR pollutant (as defined in paragraph (a)(1)(xxvii) of this section) if it causes two types of emissions increases—a significant emissions increase (as defined in paragraph (a)(1)(xxvii) of this section) and a significant net emissions increase (as defined in paragraphs (a)(1)(vi) and (x) of this section). The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase.

* * * * *

(iii) The plan shall require that for any major stationary source with a PAL for a regulated NSR pollutant, the major stationary source shall comply with requirements under paragraph (f) of this section.

(3) * * *

(ii) * * *

(D) No emissions credit may be allowed for replacing one hydrocarbon compound with another of lesser reactivity, except that emissions credit may be allowed for the replacement with those compounds listed as having negligible photochemical reactivity in § 51.100(s).

* * * * *

(4) * * *

(viii) Municipal incinerators capable of charging more than 50 tons of refuse per day;

* * * * *

(11) The plan shall require that, in meeting the emissions offset requirements of paragraph (a)(3) of this section, the emissions offsets obtained shall be for the same regulated NSR pollutant, unless interprecursor offsetting is permitted for a particular pollutant as specified in this paragraph. The plan may allow the offset requirements in paragraph (a)(3) of this section for direct PM_{2.5} emissions or emissions of precursors of PM_{2.5} to be satisfied by offsetting reductions in direct PM_{2.5} emissions or emissions of any PM_{2.5} precursor identified under paragraph (a)(1)(xxxvii)(C) of this section if such offsets comply with the interprecursor trading hierarchy and ratio established in the approved plan for a particular nonattainment area.

* * * * *

3. Amend § 51.166 by:

- a. Revising paragraph (a)(7) introductory text;
- b. Revising paragraph (a)(7)(iv)(a);
- c. Revising paragraph (a)(7)(v);
- d. Revising paragraphs (b)(1)(i)(a) and (c);
- e. Revising paragraph (b)(1)(iii)(h);
- f. Revising paragraph (b)(1)(iii)(z);
- g. Revising paragraph (b)(2)(iii)(a);
- h. Revising paragraph (b)(2)(iii)(e)(I);
- i. Revising paragraph (b)(2)(iii)(f);

- j. Removing and reserving paragraph (b)(3)(iii)(c);
- k. Revising paragraph (b)(12);
- l. Revising paragraph (b)(23)(ii);
- m. Revising paragraphs (b)(32)(i) through (iv);
- n. Revising paragraph (b)(48)(i);
- o. Revising paragraphs (b)(48)(ii) introductory text and (b)(48)(ii)(a);
- p. Revising paragraph (b)(48)(iii);
- q. Revising paragraph (b)(48)(iv)(b);
- r. Removing paragraphs (b)(53) through (56);
- s. Revising paragraph (g)(4);
- t. Revising paragraph (i)(1)(ii)(h);
- u. Removing and reserving paragraphs (i)(6) through (11);
- v. Revising paragraphs (j)(1) and (2);
- w. Revising paragraph (j)(4);
- x. Revising paragraph (k)(1) introductory text;
- y. Revising paragraph (m)(1)(iii);
- z. Revising paragraphs (p)(3) and (4);
- aa. Revising paragraphs (p)(5)(i) and (iii);
- bb. Revising paragraph (p)(6)(iii);
- cc. Revising paragraph (p)(7) introductory text;
- dd. Revising paragraph (r)(2);
- ee. Revising paragraph (r)(6)(vi)(b);
- ff. Revising paragraph (w)(7)(vii);
- gg. Revising paragraph (w)(9)(ii); and
- hh. Removing paragraph (y).

The revisions read as follows:

§ 51.166 Prevention of significant deterioration of air quality.

(a) * * *

(7) *Applicability.* Each plan shall contain procedures that incorporate the requirements in paragraphs (a)(7)(i) through (v) of this section.

* * * * *

(iv) * * *

(a) Except as otherwise provided in paragraph (a)(7)(v) of this section, and consistent with the definition of major modification contained in paragraph (b)(2) of this section, a project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases—a significant emissions increase (as defined in paragraph (b)(39) of this section), and a significant net emissions increase (as defined in paragraphs (b)(3) and (23) of this section). The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase.

* * * * *

(v) The plan shall require that for any major stationary source with a PAL for a regulated NSR pollutant, the major stationary source shall comply with requirements under paragraph (w) of this section.

(b) * * *

(1)(i) * * *

(a) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any regulated NSR pollutant: Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants (with thermal dryers), primary copper smelters, municipal incinerators capable of charging more than 50 tons of refuse

per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants (which does not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140), fossil-fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

* * * * *

(c) Any physical change that would occur at a stationary source not otherwise qualifying under paragraph (b)(1) of this section as a major stationary source, if the change would constitute a major stationary source by itself.

* * * * *

(iii) * * *

(h) Municipal incinerators capable of charging more than 50 tons of refuse per day;

* * * * *

(z) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, and

* * * * *

(2) * * *

(iii) * * *

(a) Routine maintenance, repair and replacement;

* * * * *

(e) * * *

(I) The source was capable of accommodating before January 6, 1975, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR part 51, subpart I.

* * * * *

(f) An increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR part 51, subpart I.

* * * * *

(12) *Best available control technology* means an emissions limitation (including a visible emissions standard) based on the maximum degree of reduction for each regulated NSR pollutant which would be emitted from any proposed major stationary source or major modification which the reviewing authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combination techniques for control of such pollutant. In no event shall application of best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR part 60, 61, or 63. If the reviewing authority determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, a design, equipment, work practice, operational standard or combination thereof, may be prescribed instead to satisfy the requirement for the application of best available control technology. Such standard shall, to the degree possible, set forth the emissions reduction

achievable by implementation of such design, equipment, work practice or operation, and shall provide for compliance by means which achieve equivalent results.

* * * * *

(23) * * *

(ii) *Significant* means, in reference to a net emissions increase or the potential of a source to emit a regulated NSR pollutant that paragraph (b)(23)(i) of this section does not list, any emissions rate.

* * * * *

(32) * * *

(i) The emissions unit is a reconstructed unit within the meaning of § 60.15(b)(1) of this chapter, or the emissions unit completely takes the place of an existing emissions unit;

(ii) The emissions unit is identical to or functionally equivalent to the replaced emissions unit;

(iii) The replacement does not change the basic design parameter(s) of the process unit; and

(iv) The replaced emissions unit is permanently removed from the major stationary source, otherwise permanently disabled, or permanently barred from operation by a permit that is enforceable as a practical matter. If the replaced emissions unit is brought back into operation, it shall constitute a new emissions unit.

* * * * *

(48) * * *

(i) *Greenhouse gases (GHGs)*, the air pollutant defined in § 86.1818-12(a) of this chapter as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride, shall not be subject to regulation except as provided in paragraph (b)(48)(iv) of this section.

(ii) For purposes of paragraphs (b)(48)(iii) and (iv) of this section, the term tpy CO_2 *equivalent emissions* (CO_2e) shall represent an amount of GHGs emitted, and shall be computed as follows:

(a) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A-1 to subpart A of part 98 of this chapter—Global Warming Potentials.

* * * * *

(iii) The term *emissions increase* as used in paragraph (b)(48)(iv) of this section shall mean that both a significant emissions increase (as calculated using the procedures in paragraph (a)(7)(iv) of this section) and a significant net emissions increase (as defined in paragraphs (b)(3) and (23) of this section) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO_2e , and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant and “significant” is defined as 75,000 tpy CO_2e instead of applying the value in paragraph (b)(23)(ii) of this section.

(iv) * * *

(b) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO_2e or more.

* * * * *

(g) * * *

(4) The plan shall provide that lands within the exterior boundaries of Indian Reservations may be redesignated only by the appropriate Indian Governing Body. The appropriate Indian Governing Body may submit to the Administrator a proposal to redesignate areas Class I, Class II, or Class III provided that:

* * * * *

(i) * * *

(1) * * *

(ii) * * *

(h) Municipal incinerators capable of charging more than 50 tons of refuse per day;

* * * * *

(j) * * *

(1) A major stationary source or major modification shall meet each applicable emissions limitation under the State implementation plan and each applicable emission standard-and standard of performance under 40 CFR part 60, 61, or 63.

(2) A new major stationary source shall apply best available control technology for each regulated NSR pollutant that it would have the potential to emit in significant amounts.

* * * * *

(4) For phased construction projects, the determination of best available control technology shall be reviewed and modified as appropriate at the latest reasonable time which occurs no later than 18 months prior to commencement of construction of each independent phase of the project. At such time, the owner or operator of the applicable stationary source may be required to demonstrate the adequacy of any previous determination of best available control technology for the source.

(k) * * *

(1) *Required demonstration.* The plan shall provide that the owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reductions (including secondary emissions), would not cause or contribute to air pollution in violation of:

* * * * *

(m) * * *

(1) * * *

(iii) The plan shall provide that with respect to any such pollutant (other than nonmethane hydrocarbons) for which such a standard does exist, the analysis shall contain continuous air quality monitoring data gathered for purposes of determining whether emissions of that pollutant would cause or contribute to a violation of the standard or any maximum allowable increase.

* * * * *

(p) * * *

(3) *Denial—impact on air quality related values.* The plan shall provide a mechanism whereby a Federal Land Manager of any such lands may present to the State, after the reviewing authority's preliminary determination required under procedures developed in accordance with paragraph (q) of this section, a demonstration that the emissions from the proposed source or modification would have an adverse impact on the air quality-related values (including visibility) of any Federal mandatory Class I lands, notwithstanding that the change in air quality resulting from emissions from such source or modification would not cause or contribute to concentrations which would exceed the maximum allowable increases for a Class I area. If the State concurs with such demonstration, the reviewing authority shall not issue the permit.

(4) *Class I variances.* The plan may provide that the owner or operator of a proposed source or modification may demonstrate to the Federal Land Manager that the emissions from such source would have no adverse impact on the air quality related values of such lands (including visibility), notwithstanding that the change in air quality resulting from emissions from such source or modification would cause or contribute to concentrations which would exceed the maximum allowable increases for a Class I area. If the Federal land manager concurs with such demonstration and so certifies to the State, the reviewing authority may, provided that the applicable requirements are otherwise met, issue the permit with such emission limitations as may be necessary to assure that emissions of sulfur dioxide, PM_{2.5}, PM₁₀, and nitrogen oxides would not exceed the following maximum allowable increases over minor source baseline concentration for such pollutants:

(5) * * *

(i) The owner or operator of a proposed source or modification which cannot be approved under procedures developed pursuant to paragraph (p)(4) of this section may demonstrate to the Governor that the source or modification cannot be constructed by reason of any maximum allowable increase for sulfur dioxide for periods of twenty-four hours or less applicable to any Class I area and, in the case of Federal mandatory Class I areas, that a variance under this clause would not adversely affect the air quality related values of the area (including visibility);

* * * * *

(iii) If such variance is granted, the reviewing authority may issue a permit to such source or modification in accordance with provisions developed pursuant to paragraph (p)(7) of this section provided that the applicable requirements of the plan are otherwise met.

(6) * * *

(iii) If such a variance is approved, the reviewing authority may issue a permit in accordance with provisions developed pursuant to the requirements of paragraph (p)(7) of this section provided that the applicable requirements of the plan are otherwise met.

(7) *Emission limitations for Presidential or gubernatorial variance.* The plan shall provide that, in the case of a permit issued under procedures developed pursuant to paragraph (p)(5) or (6) of this section, the source or modification shall comply with emission limitations as may be necessary to assure that emissions of sulfur dioxide from the source or modification would not (during any day on which the otherwise applicable maximum allowable increases are exceeded) cause or contribute to concentrations which would exceed the following maximum allowable increases over the baseline concentration and to assure that such emissions would not cause or contribute to concentrations which exceed the otherwise applicable maximum allowable increases for periods of exposure of 24 hours or less for more than 18 days, not necessarily consecutive, during any annual period:

* * * * *

(r) * * *

(2) The plan shall provide that at such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then the requirements of paragraphs (j) through (r) of this section shall apply to the source or modification as though construction had not yet commenced on the source or modification.

* * * * *

(6) * * *

(vi) * * *

(b) A projected actual emissions increase that, added to the amount of emissions excluded under paragraph (b)(40)(ii)(c) of this section, sums to at least 50 percent of the amount that is a “significant emissions increase,” as defined under paragraph (b)(39) of this section (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant. For a project for which a reasonable possibility occurs only within the meaning of this paragraph (r)(6)(vi)(b), and not also within the meaning of paragraph (r)(6)(vi)(a) of this section, then the provisions under paragraphs (r)(6)(ii) through (v) of this section do not apply to the project.

* * * * *

(w) * * *

(7) * * *

(vii) A requirement that the major stationary source owner or operator monitor all emissions units in accordance with the provisions under paragraph (w)(12) of this section.

* * * * *

(9) * * *

(ii) Each emissions unit(s) shall comply with the allowable emission limitation on a 12-month rolling basis. The reviewing authority may approve the use of monitoring systems (source testing, emission factors, etc.) other than CEMS, CERMS, PEMS, or CPMS to demonstrate compliance with the allowable emission limitation.

* * * * *

4. Appendix S to part 51 is amended:

a. In section I by revising the first two undesignated paragraphs;

b. In section II by:

i. Revising paragraph A.4.(i)(a);

ii. Revising paragraphs A.4.(iii) introductory text and A.4.(iii)(h);

iii. Revising paragraphs A.5.(iii)(e)(1) and (2) and (f);

iv. Revising paragraphs A.7.(ii) and A.34 and 35;

v. Adding paragraph A.37;

vi. Revising paragraph B;

vii. Revising paragraph F.(8); and

viii. Revising paragraph II.G;

c. In section III by:

i. Revising paragraphs B and C; and

ii. Revising paragraph D. *Condition 1*;

d. In section IV by:

i. Revising paragraphs A. *Condition 1* and *Condition 4*;

ii. Revising paragraph B introductory text;

iii. Revising paragraph B.(i).1;

iv. Revising paragraph C.3.(i);

v. Revising paragraphs C.3.(ii) introductory text and C.3.(ii)(2);

vi. Revising paragraphs C.4 and 5;

- vii. Revising paragraphs D and G.1 and 5;
 - viii. Revising paragraph H;
 - ix. Revising paragraph I.2;
 - x. Revising paragraph J.6.(ii); and
 - xi. Revising paragraph K.5 and paragraph K.14 introductory text; and
- e. In section V by revising paragraph A.

The revisions read as follows:

APPENDIX S TO PART 51—EMISSION OFFSET INTERPRETATIVE RULING

I. INTRODUCTION

This appendix sets forth EPA's Interpretative Ruling on the preconstruction review requirements for stationary sources of air pollution (not including indirect sources) under 40 CFR part 51, subpart I. A major new source or major modification which would locate in any area designated under section 107(d) of the Act as attainment or unclassifiable for ozone that is located in an ozone transport region or which would locate in an area designated in 40 CFR part 81, subpart C, as nonattainment for a pollutant for which the source or modification would be major may be allowed to construct only if the stringent conditions set forth below are met. These conditions are designed to ensure that the new source's emissions will be controlled to the greatest degree possible; that more than equivalent offsetting emission reductions (*emission offsets*) will be obtained from existing sources; and that there will be progress toward achievement of the NAAQS.

For each area designated as exceeding a NAAQS (nonattainment area) under 40 CFR part 81, subpart C, or for any area designated under section 107(d) of the Act as attainment or unclassifiable for ozone that is located in an ozone transport region, this Interpretative Ruling will be superseded after June 30, 1979 (a) by preconstruction review provisions of the revised SIP, if the SIP meets the requirements of part D, Title 1, of the Act; or (b) by a prohibition on construction under the applicable SIP and section 110(a)(2)(I) of the Act, if the SIP does not

meet the requirements of part D. The Ruling will remain in effect to the extent not superseded under the Act. This prohibition on major new source construction does not apply to a source whose permit to construct was applied for during a period when the SIP was in compliance with part D, or before the deadline for having a revised SIP in effect that satisfies part D.

* * * * *

II. INITIAL SCREENING ANALYSES AND DETERMINATION OF APPLICABLE REQUIREMENTS

A. * * *

4. (i) * * *

(a) Any stationary source of air pollutants which emits, or has the potential to emit, 100 tons per year or more of a regulated NSR pollutant (as defined in paragraph II.A.31 of this Ruling), except that lower emissions thresholds shall apply in areas subject to subpart 2, subpart 3, or subpart 4 of part D, title I of the Act, according to paragraphs II.A.4(i)(a)(1) through (8) of this Ruling.

* * * * *

(iii) The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this Ruling whether it is a major stationary source, unless the source belongs to one of the following categories of stationary sources:

* * * * *

(h) Municipal incinerators capable of charging more than 50 tons of refuse per day;

* * * * *

5. * * *

(iii) * * *

(e) * * *

(I) The source was capable of accommodating before December 21, 1976, unless such change would be prohibited under any federally enforceable permit condition which was

established after December 21, 1976, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR part 51, subpart I; or

(2) The source is approved to use under any permit issued under this Ruling;

* * * * *

(f) An increase in the hours of operation or in the production rate, unless such change is prohibited under any federally enforceable permit condition which was established after December 21, 1976, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR part 51, subpart I;

* * * * *

7. * * *

(ii) An existing emissions unit is any emissions unit that does not meet the requirements in paragraph II.A.7(i) of this Ruling. A replacement unit, as defined in paragraph II.A.37 of this Ruling, is an existing emissions unit.

* * * * *

34. *Best available control technology (BACT)* means an emissions limitation (including a visible emissions standard) based on the maximum degree of reduction for each regulated NSR pollutant which would be emitted from any proposed major stationary source or major modification which the reviewing authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant. In no event shall application of best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR part 60, 61, or 63. If the reviewing authority determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, a

design, equipment, work practice, operational standard, or combination thereof, may be prescribed instead to satisfy the requirement for the application of BACT. Such standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of such design, equipment, work practice or operation, and shall provide for compliance by means which achieve equivalent results.

35. *Prevention of Significant Deterioration (PSD) permit* means any permit that is issued under a major source preconstruction permit program that has been approved by the Administrator and incorporated into the plan to implement the requirements of § 51.166, or under the program in § 52.21 of this chapter.

* * * * *

37. *Replacement unit* means an emissions unit for which all the criteria listed in paragraphs II.A.37(i) through (iv) of this Ruling are met. No creditable emission reductions shall be generated from shutting down the existing emissions unit that is replaced.

(i) The emissions unit is a reconstructed unit within the meaning of § 60.15(b)(1) of this chapter, or the emissions unit completely takes the place of an existing emissions unit;

(ii) The emissions unit is identical to or functionally equivalent to the replaced emissions unit;

(iii) The replacement does not alter the basic design parameters of the process unit; and

(iv) The replaced emissions unit is permanently removed from the major stationary source, otherwise permanently disabled, or permanently barred from operation by a permit that is enforceable as a practical matter. If the replaced emissions unit is brought back into operation, it shall constitute a new emissions unit.

B. *Review of all sources for emission limitation compliance.* The reviewing authority must examine each proposed major new source and proposed major modification¹ to determine if such a source will meet all applicable emission requirements in the SIP, any applicable new source performance standard in part 60 of this chapter, or any national emission standard for

hazardous air pollutants in part 61 or 63 of this chapter. If the reviewing authority determines that the proposed major new source cannot meet the applicable emission requirements, the permit to construct must be denied.

¹Hereafter the term *source* will be used to denote both any source and any modification.

* * * * *

F. * * *

(8) Municipal incinerators capable of charging more than 50 tons of refuse per day;

* * * * *

G. *Secondary emissions.* Secondary emissions need not be considered in determining whether the emission rates in section II.C. above would be exceeded. However, if a source is subject to this Ruling on the basis of the direct emissions from the source, the applicable conditions of this Ruling must also be met for secondary emissions. However, secondary emissions may be exempt from Conditions 1 and 2 of section IV of this Ruling. Also, since EPA's authority to perform or require indirect source review relating to mobile sources regulated under Title II of the Act (motor vehicles and aircraft) has been restricted by statute, consideration of the indirect impacts of motor vehicles and aircraft traffic is not required under this Ruling.

III. * * *

B. Sources to which this section applies must meet Conditions 1, 2, and 4 of section IV.A. of this Ruling.² However, such sources may be exempt from Condition 3 of section IV.A. of this Ruling.

² The discussion in this paragraph is a proposal, but represents EPA's interim policy until final rulemaking is completed.

C. *Review of specified sources for air quality impact.* For *stable* air pollutants (*i.e.*, SO₂, particulate matter and CO), the determination of whether a source will cause or contribute to a violation of a NAAQS generally should be made on a case-by-case basis as of the proposed new

source's start-up date using the source's allowable emissions in an atmospheric simulation model (unless a source will clearly impact on a receptor which exceeds a NAAQS).

For sources of nitrogen oxides, the initial determination of whether a source would cause or contribute to a violation of the NAAQS for NO₂ should be made using an atmospheric simulation model assuming all the nitric oxide emitted is oxidized to NO₂ by the time the plume reaches ground level. The initial concentration estimates may be adjusted if adequate data are available to account for the expected oxidation rate.

For ozone, sources of volatile organic compounds, locating outside a designated ozone nonattainment area, will be presumed to have no significant impact on the designated nonattainment area. If ambient monitoring indicates that the area of source location is in fact nonattainment, then the source may be permitted under the provisions of any State plan adopted pursuant to section 110(a)(2)(D) of the Act until the area is designated nonattainment and a State implementation plan revision is approved. If no State plan pursuant to section 110(a)(2)(D) of the Act has been adopted and approved, then this Ruling shall apply.

As noted above, the determination as to whether a source would cause or contribute to a violation of a NAAQS should be made as of the new source's start-up date. Therefore, if a designated nonattainment area is projected to be an attainment area as part of an approved SIP control strategy by the new source start-up date, offsets would not be required if the new source would not cause a new violation.

D. * * *

Condition 1. The new source is required to meet a more stringent emission limitation³ and/or the control of existing sources below allowable levels is required so that the source will not cause a violation of any NAAQS.

³If the reviewing authority determines that technological or economic limitations on the application of measurement methodology to a particular class of sources would make the imposition of an enforceable numerical emission standard infeasible, the authority may instead

prescribe a design, operational, or equipment standard. In such cases, the reviewing authority shall make its best estimate as to the emission rate that will be achieved and must specify that rate in the required submission to EPA (see part V of this Ruling). Any permits issued without an enforceable numerical emission standard must contain enforceable conditions which assure that the design characteristics or equipment will be properly maintained (or that the operational conditions will be properly performed) so as to continuously achieve the assumed degree of control. Such conditions shall be enforceable as emission limitations by private parties under section 304. Hereafter, the term *emission limitation* shall also include such design, operational, or equipment standards.

* * * * *

IV. * * *

A. * * *

Condition 1. The new source is required to meet an emission limitation⁴ which specifies the lowest achievable emission rate for such source.

⁴If the reviewing authority determines that technological or economic limitations on the application of measurement methodology to a particular class of sources would make the imposition of an enforceable numerical emission standard infeasible, the authority may instead prescribe a design, operational or equipment standard. In such cases, the reviewing authority shall make its best estimate as to the emission rate that will be achieved and must specify that rate in the required submission to EPA (see part V of this Ruling). Any permits issued without an enforceable numerical emission standard must contain enforceable conditions which assure that the design characteristics or equipment will be properly maintained (or that the operational conditions will be properly performed) so as to continuously achieve the assumed degree of control. Such conditions shall be enforceable as emission limitations by private parties under section 304. Hereafter, the term *emission limitation* shall also include such design, operational, or equipment standards.

* * * * *

Condition 4. The emission offsets will provide a positive net air quality benefit in the affected area (see section IV.D. of this Ruling). Atmospheric simulation modeling is not necessary for volatile organic compounds and NO_x. Fulfillment of Condition 3 under section IV.A. of this Ruling and the requirements under section IV.D. of this Ruling will be considered adequate to meet this condition.

* * * * *

B. Exemptions from certain conditions. The reviewing authority may exempt the following sources from Condition 1 under section III.D. of this Ruling or Conditions 3 and 4 under section IV.A. of this Ruling:

(i) * * *

1. The applicant demonstrates that it made its best efforts to obtain sufficient emission offsets to comply with Condition 1 under section III.D. of this Ruling or Conditions 3 and 4 under section IV.A. of this Ruling and that such efforts were unsuccessful;

* * * * *

C. * * *

3. * * *

(i) Emissions reductions achieved by shutting down an existing source or curtailing production or operating hours may be generally credited for offsets if they meet the requirements in paragraphs IV.C.3.(i)(1) and (2) of this Ruling.

* * * * *

(ii) Emissions reductions achieved by shutting down an existing source or curtailing production or operating hours and that do not meet the requirements in paragraphs IV.C.3.(i)(1) and (2) of this Ruling may be generally credited only if:

* * * * *

(2) The applicant can establish that the proposed new source is a replacement for the shutdown or curtailed source, and the emissions reductions achieved by the shutdown or curtailment met the requirements of paragraphs IV.C.3.(i)(1) and (2) of this Ruling.

4. *Credit for VOC substitution.* No emission offset credit may be allowed for replacing one hydrocarbon compound with another of lesser reactivity, except that an emission credit may be allowed for the replacement with those compounds listed as having negligible photochemical reactivity in § 51.100(s).

5. *“Banking” of emission offset credit.* For new sources obtaining permits by applying offsets after January 16, 1979, the reviewing authority may allow offsets that exceed the requirements of reasonable progress toward attainment (Condition 3 under paragraph IV.A of this Ruling) to be “banked” (*i.e.*, saved to provide offsets for a source seeking a permit in the future) for use under this Ruling. Likewise, the reviewing authority may allow the owner of an existing source that reduces its own emissions to bank any resulting reductions beyond those required by the SIP for use under this Ruling, even if none of the offsets are applied immediately to a new source permit. A reviewing authority may allow these banked offsets to be used under the preconstruction review program required by part D of the Act, as long as these banked emissions are identified and accounted for in the SIP control strategy. A reviewing authority may not approve the construction of a source using banked offsets if the new source would interfere with the SIP control strategy or if such use would violate any other condition set forth for use of offsets. To preserve banked offsets, the reviewing authority should identify them in either a SIP revision or a permit, and establish rules as to how and when they may be used.

* * * * *

D. *Location of offsetting emissions.* The owner or operator of a new or modified major stationary source may comply with any offset requirement in effect under this Ruling for increased emissions of any air pollutant only by obtaining emissions reductions of such air pollutant from the same source or other sources in the same nonattainment area, except that the

reviewing authority may allow the owner or operator of a source to obtain such emissions reductions in another nonattainment area if the conditions under paragraphs IV.D.1 and 2 of this Ruling are met.

* * * * *

G. * * *

1. In meeting the emissions offset requirements of Condition 3 under paragraph IV.A. of this Ruling, the ratio of total actual emissions reductions to the emissions increase shall be at least 1:1 unless an alternative ratio is provided for the applicable nonattainment area in paragraphs IV.G.2 through IV.G.4 of this Ruling.

* * * * *

5. *Interpollutant offsetting.* In meeting the emissions offset requirements of paragraph IV.A, Condition 3 of this Ruling, the emissions offsets obtained shall be for the same regulated NSR pollutant unless interpollutant offsetting is permitted for a particular pollutant as specified in this paragraph IV.G.5. The offset requirements of paragraph IV.A, Condition 3 of this Ruling for direct PM_{2.5} emissions or emissions of precursors of PM_{2.5} may be satisfied by offsetting reductions of direct PM_{2.5} emissions or emissions of any PM_{2.5} precursor identified under paragraph II.A.31 (iii) of this Ruling if such offsets comply with an interprecursor trading hierarchy and ratio approved by the Administrator.

* * * * *

H. *Additional provisions for emissions of nitrogen oxides in ozone transport regions and nonattainment areas.* The requirements of this Ruling applicable to major stationary sources and major modifications of volatile organic compounds shall apply to nitrogen oxides emissions from major stationary sources and major modifications of nitrogen oxides in an ozone transport region or in any ozone nonattainment area, except in ozone nonattainment areas where the Administrator has granted a NO_x waiver applying the standards set forth under section 182(f) of the Act and the waiver continues to apply

I. * * *

2. For any major stationary source with a PAL for a regulated NSR pollutant, the major stationary source shall comply with requirements under paragraph IV.K of this Ruling.

J. * * *

6. * * *

(ii) A projected actual emissions increase that, added to the amount of emissions excluded under paragraph II.A.24(ii)(c) of this Ruling, sums to at least 50 percent of the amount that is a “significant emissions increase,” as defined under paragraph II.A.23 of this Ruling (without reference to the amount that is a significant net emissions increase), for the regulated NSR pollutant. For a project for which a reasonable possibility occurs only within the meaning of paragraph IV.J.6(ii) of this Ruling, and not also within the meaning of paragraph IV.J.6(i) of this Ruling, then provisions in paragraphs IV.J.2 through IV.J.5 of this Ruling do not apply to the project.

* * * * *

K. * * *

5. *Public participation requirement for PALs.* PALs for existing major stationary sources shall be established, renewed, or increased through a procedure that is consistent with §§ 51.160 and 51.161. This includes the requirement that the reviewing authority provide the public with notice of the proposed approval of a PAL permit and at least a 30-day period for submittal of public comment. The reviewing authority must address all material comments before taking final action on the permit.

* * * * *

14. *Reporting and notification requirements.* The owner or operator shall submit semi-annual monitoring reports and prompt deviation reports to the reviewing authority in accordance with the applicable title V operating permit program. The reports shall meet the requirements in paragraphs IV.K.14(i) through (iii) of this Ruling.

* * * * *

V. * * *

A. *Source initiated emission offsets*. A source may propose emission offsets which involve:

(1) Reductions from sources controlled by the source owner (internal emission offsets); and/or (2) reductions from neighboring sources (external emission offsets). The source does not have to investigate all possible emission offsets. As long as the emission offsets obtained represent reasonable progress toward attainment, they will be acceptable. It is the reviewing authority's responsibility to assure that the emission offsets will be as effective as proposed by the source. An internal emission offset will be considered enforceable if it is made a SIP requirement by inclusion as a condition of the new source permit and the permit is forwarded to the appropriate EPA Regional Office.⁷ An external emission offset will not be enforceable unless the affected source(s) providing the emission reductions is subject to a new SIP requirement to ensure that its emissions will be reduced by a specified amount in a specified time. Thus, if the source(s) providing the emission reductions does not obtain the necessary reduction, it will be in violation of a SIP requirement and subject to enforcement action by EPA, the State, and/or private parties.

⁷The emission offset will, therefore, be enforceable by EPA under section 113 of the Act as an applicable SIP requirement and will be enforceable by private parties under section 304 of the Act as an emission limitation.

The form of the SIP revision may be a State or local regulation, operating permit condition, consent or enforcement order, or any other mechanism available to the State that is enforceable under the Clean Air Act. If a SIP revision is required, the public hearing on the revision may be substituted for the normal public comment procedure required for all major sources under § 51.102. The formal publication of the SIP revision approval in the **Federal Register** need not appear before the source may proceed with construction. To minimize

uncertainty that may be caused by these procedures, EPA will, if requested by the State, propose a SIP revision for public comment in the **Federal Register** concurrently with the State public hearing process. Of course, any major change in the final permit/SIP revision submitted by the State may require a reproposal by EPA.

* * * * *

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

5. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

Subpart A—General Provisions

6. Amend § 52.21 by:

- a. Revising paragraphs (a)(2)(iv)(a) and (f);
- c. Revising paragraphs (b)(1)(i)(a) through (c);
- d. Revising paragraphs (b)(1)(iii)(h) and (z)
- e. Revising paragraphs (b)(2)(iii)(a) and (b)
- f. Revising paragraphs (b)(2)(iii)(e)(I) and (f);
- g. Removing and reserving paragraph (b)(3)(iii)(b);
- h. Revising paragraph (b)(3)(vi)(c);
- i. Revising paragraph (b)(12);
- j. Revising paragraph (b)(23)(ii)
- k. Revising paragraphs (b)(33)(i) through (iv);
- l. Revising paragraph (b)(41)(ii)(c);
- m. Revising paragraph (b)(48)(i)(c);
- n. Revising paragraph (b)(48)(ii)(d);
- o. Revising paragraphs (b)(49)(i), (b)(49)(ii) introductory text, (b)(49)(ii)(a), and (b)(49)(iii);
- p. Revising paragraph (b)(49)(iv)(b);

- q. Revising paragraphs (b)(51);
- r. Removing paragraphs (b)(55) through (58);
- s. Revising paragraph (g)(4) introductory text;
- t. Removing and reserving paragraphs (i)(1)(i) through (v);
- u. Revising paragraph (i)(1)(vii)(h);
- v. Removing paragraphs (i)(1)(ix) and (x);
- w. Removing and reserving paragraphs (i)(6) through (12);
- x. Revising paragraph (j)(1);
- y. Revising paragraph (m)(1)(i)(a);
- z. Removing and reserving paragraphs (m)(1)(v), (vii), and (viii);
- aa. Revising paragraph (n)(1) introductory text;
- bb. Revising paragraphs (p)(5) introductory text, (p)(6) and (7), and (p)(8) introductory text;
- cc. Revising paragraph (r)(4);
- dd. Revising paragraphs (u)(2)(ii) and (u)(3);
- ee. Revising paragraph (w)(1); and
- ff. Removing paragraph (cc).

The revisions read as follows:

§ 52.21 Prevention of significant deterioration of air quality.

(a) * * *

(2) * * *

(iv) * * *

(a) Except as otherwise provided in paragraph (a)(2)(v) of this section, and consistent with the definition of major modification contained in paragraph (b)(2) of this section, a project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases—a significant emissions increase (as defined in paragraph (b)(40) section) and a

significant net emissions increase (as defined in paragraphs (b)(3) and (23) of this section). The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase.

* * * * *

(f) Hybrid test for projects that involve multiple types of emissions units. A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference for all emissions units, using the method specified in paragraphs (a)(2)(iv)(c) and (d) of this section as applicable with respect to each emissions unit, equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

* * * * *

(b) * * *

(1)(i) * * *

(a) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any regulated NSR pollutant: Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants (with thermal dryers), primary copper smelters, municipal incinerators capable of charging more than 50 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants (which does not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140), fossil-fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding

300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(b) Notwithstanding the stationary source size specified in paragraph (b)(1)(i)(a) of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of a regulated NSR pollutant; or

(c) Any physical change that would occur at a stationary source not otherwise qualifying under paragraph (b)(1) of this section as a major stationary source, if the change would constitute a major stationary source by itself.

* * * * *

(iii) * * *

(h) Municipal incinerators capable of charging more than 50 tons of refuse per day;

* * * * *

(z) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, and

* * * * *

(2) * * *

(iii) * * *

(a) Routine maintenance, repair and replacement;

(b) Use of an alternative fuel or raw material by reason of an order under sections 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plan pursuant to the Federal Power Act;

* * * * *

(e) * * *

(I) The source was capable of accommodating before January 6, 1975, unless such change would be prohibited under any federally enforceable permit condition which was

established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR part 51, subpart I; or

* * * * *

(f) An increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR part 51, subpart I.

* * * * *

(vi) * * *

(c) It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change.

* * * * *

(12) *Best available control technology* means an emissions limitation (including a visible emission standard) based on the maximum degree of reduction for each pollutant subject to regulation under the Act which would be emitted from any proposed major stationary source or major modification which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant. In no event shall application of best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR part 60, 61, or 63. If the Administrator determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, a design, equipment, work practice, operational standard, or combination thereof, may be prescribed instead to satisfy the requirement for the application of best available control technology. Such standard shall, to the

degree possible, set forth the emissions reduction achievable by implementation of such design, equipment, work practice or operation, and shall provide for compliance by means which achieve equivalent results.

* * * * *

(23) * * *

(ii) *Significant* means, in reference to a net emissions increase or the potential of a source to emit a regulated NSR pollutant that paragraph (b)(23)(i) of this section does not list, any emissions rate.

* * * * *

(33) * * *

(i) The emissions unit is a reconstructed unit within the meaning of § 60.15(b)(1) of this chapter, or the emissions unit completely takes the place of an existing emissions unit;

(ii) The emissions unit is identical to or functionally equivalent to the replaced emissions unit;

(iii) The replacement does not alter the basic design parameters of the process unit; and

(iv) The replaced emissions unit is permanently removed from the major stationary source, otherwise permanently disabled, or permanently barred from operation by a permit that is enforceable as a practical matter. If the replaced emissions unit is brought back into operation, it shall constitute a new emissions unit.

* * * * *

(41) * * *

(ii) * * *

(c) Shall exclude, in calculating any increase in emissions that results from the particular project, that portion of the unit's emissions following the project that an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual

emissions under paragraph (b)(48) of this section and that are also unrelated to the particular project, including any increased utilization due to product demand growth; or

* * * * *

(48) * * *

(i) * * * *

(c) For a regulated NSR pollutant, when a project involves multiple emissions units, only one consecutive 24-month period must be used to determine the baseline actual emissions for the emissions units being changed. A different consecutive 24-month period can be used for each regulated pollutant.

* * * * *

(ii) * * *

(d) For a regulated NSR pollutant, when a project involves multiple emissions units, only one consecutive 24-month period must be used to determine the baseline actual emissions for all the emissions units being changed. A different consecutive 24-month period can be used for each regulated NSR pollutant.

* * * * *

(49) * * *

(i) *Greenhouse gases (GHGs)*, the air pollutant defined in § 86.1818-12(a) of this chapter as the aggregate group of six greenhouse gases: Carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride, shall not be subject to regulation except as provided in paragraph (b)(49)(iv) of this section and shall not be subject to regulation if the stationary source maintains its total source-wide emissions below the GHG PAL level, meets the requirements in paragraphs (aa)(1) through (15) of this section, and complies with the PAL permit containing the GHG PAL.

(ii) For purposes of paragraphs (b)(49)(iii) through (iv) of this section, the term *tpy CO₂ equivalent emissions (CO₂e)* shall represent an amount of GHGs emitted, and shall be computed as follows:

(a) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A-1 to subpart A of part 98 of this chapter - Global Warming Potentials.

* * * * *

(iii) The term *emissions increase* as used in paragraph (b)(49)(iv) of this section shall mean that both a significant emissions increase (as calculated using the procedures in paragraph (a)(2)(iv) of this section) and a significant net emissions increase (as defined in paragraphs (b)(3) and (23) of this section) occur. For the pollutant GHGs, an emissions increase shall be based on tpy CO₂e, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant and “significant” is defined as 75,000 tpy CO₂e instead of applying the value in paragraph (b)(23)(ii) of this section.

(iv) * * *

(b) The stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy CO₂e or more.

* * * * *

(51) *Reviewing authority* means the State air pollution control agency, local agency, other State agency, Indian tribe, or other agency authorized by the Administrator to carry out a permit program under § 51.165 or § 51.166 of this chapter, or the Administrator in the case of EPA-implemented permit programs under this section.

* * * * *

(g) * * *

(4) Lands within the exterior boundaries of Indian Reservations may be redesignated only by the appropriate Indian Governing Body. The appropriate Indian Governing Body may submit to the Administrator a proposal to redesignate areas Class I, Class II, or Class III provided that:

* * * * *

(i) * * *

(1) * * *

(vii) * * *

(h) Municipal incinerators capable of charging more than 50 tons of refuse per day;

* * * * *

(j) * * *

(1) A major stationary source or major modification shall meet each applicable emissions limitation under the State Implementation Plan and each applicable emissions standard and standard of performance under 40 CFR part 60, 61, or 63.

* * * * *

(m) * * *

(1) * * *

(i) * * *

(a) For the source, each pollutant that it would have the potential to emit in a significant amount;

* * * * *

(n) * * *

(1) With respect to a source or modification to which paragraphs (j), (k), (m), and (o) of this section apply, such information shall include:

* * * * *

(p) * * *

(5) *Class I variances.* The owner or operator of a proposed source or modification may demonstrate to the Federal Land Manager that the emissions from such source or modification would have no adverse impact on the air quality related values of any such lands (including visibility), notwithstanding that the change in air quality resulting from emissions from such source or modification would cause or contribute to concentrations which would exceed the maximum allowable increases for a Class I area. If the Federal Land Manager concurs with such demonstration and he so certifies, the State may authorize the Administrator, provided that the applicable requirements of this section are otherwise met, to issue the permit with such emission limitations as may be necessary to assure that emissions of sulfur dioxide, PM_{2.5}, PM₁₀, and nitrogen oxides would not exceed the following maximum allowable increases over minor source baseline concentration for such pollutants:

* * * * *

(6) *Sulfur dioxide variance by Governor with Federal Land Manager's concurrence.* The owner or operator of a proposed source or modification which cannot be approved under paragraph (p)(5) of this section may demonstrate to the Governor that the source cannot be constructed by reason of any maximum allowable increase for sulfur dioxide for a period of 24 hours or less applicable to any Class I area and, in the case of Federal mandatory Class I areas, that a variance under this clause would not adversely affect the air quality related values of the area (including visibility). The Governor, after consideration of the Federal Land Manager's recommendation (if any) and subject to his concurrence, may, after notice and public hearing, grant a variance from such maximum allowable increase. If such variance is granted, the Administrator shall issue a permit to such source or modification pursuant to the requirements of paragraph (p)(8) of this section provided that the applicable requirements of this section are otherwise met.

(7) *Variance by the Governor with the President's concurrence.* In any case where the Governor recommends a variance with which the Federal Land Manager does not concur, the

recommendations of the Governor and the Federal Land Manager shall be transmitted to the President. The President may approve the Governor's recommendation if he finds that the variance is in the national interest. If the variance is approved, the Administrator shall issue a permit pursuant to the requirements of paragraph (p)(8) of this section provided that the applicable requirements of this section are otherwise met.

(8) *Emission limitations for Presidential or gubernatorial variance.* In the case of a permit issued pursuant to paragraph (p)(6) or (7) of this section, the source or modification shall comply with such emission limitations as may be necessary to assure that emissions of sulfur dioxide from the source or modification would not (during any day on which the otherwise applicable maximum allowable increases are exceeded) cause or contribute to concentrations which would exceed the following maximum allowable increases over the baseline concentration and to assure that such emissions would not cause or contribute to concentrations which exceed the otherwise applicable maximum allowable increases for periods of exposure of 24 hours or less for more than 18 days, not necessarily consecutive, during any annual period:

* * * * *

(r) * * *

(4) At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then the requirements of paragraphs (j) through (s) of this section shall apply to the source or modification as though construction had not yet commenced on the source or modification.

* * * * *

(u) * * *

(2) * * *

(ii) The delegate agency shall send a copy of any public comment notice required under paragraph (q) of this section to the Administrator through the appropriate Regional Office.

(3) In the case of a source or modification which proposes to construct in a Class III area, emissions from which would cause or contribute to air quality exceeding the maximum allowable increase applicable if the area were designated a Class II area, and where no standard under section 111 of the Act has been promulgated for such source category, the Administrator must approve the determination of best available control technology as set forth in the permit.

* * * * *

(w) * * *

(1) Any permit issued under this section or a prior version of this section shall remain in effect, unless and until it expires under paragraph (r)(2) of this section or is rescinded under this paragraph (w).

* * * * *